in the Act of 1989. This consideration could not, however, properly affect the outcome of the Attorney General's motion. It is for these reasons that the petition must be dismissed.

Petition dismissed.

Solicitors: *Simon Muirhead & Burton; Jaques & Lewis.*

Reported by *Terence Tan Bian Chye*

SINGAPORE REPORTS

Liew Kim Yong v Public Prosecutor

COURT OF CRIMINAL APPEAL (SINGAPORE) - CRIMINAL APPEAL NO 5 OF 1987
SINNATHURAY AND LAI KEW CHAI JJ AND GRIMBERG JC
30 JUNE 1989

Evidence - Burden of proof at end of prosecution's case - Inconsistencies in witness's evidence - Whether taken into account by judge - Whether judge took into account witness's intoxication - Corroboration - Whether self-corroboration possible - Whether victim's distress could amount to corroboration - Criminal Procedure Code (Cap 68, 1985 Ed), s 121(6) - Evidence Act (Cap 97, 1985 Ed), s 159

Criminal Procedure - Appeal against conviction and sentence - Evidentiary issues - Sentence for rape - No aggravating features present - Allergy of the appellant to pain-killing drugs - Whether relevant to sentence of caning

Criminal Law - Rape - Abetment of rape

The appellant was convicted of raping the complainant and of abetting the rape of the complainant by another man. The appellant was convicted on both charges and sentenced to seven years' imprisonment and six strokes of the cane on the charge of rape, and seven years' imprisonment on the abetment charge, both sentences to run concurrently. He appealed against both his conviction and his sentence. The appellant appealed against sentence on the grounds that there had been no violent assault, no weapon used, no threats and the relationship between the appellant and the complainant prior to the offence had been pleasant.

Held, dismissing the appeals against conviction and sentence:

(1) The court was bound by the decision in *Haw Tua Tau*[1] as to the burden of proof required at the end of the prosecution's case. It was plain on the face of the record that when the prosecution here concluded, a case had been made out which if unrebutted would have warranted the appellant's conviction.

(2) Once this hurdle was passed, the trial judge was entitled to set the appellant's version of the events against that of the complainant. It is evident that he did so with considerable care.

(3) As to the principal inconsistencies in the complainant's evidence, the trial judge was alive to them. The fact that no injuries were found on the complainant, except on her shoulders, did not raise a reasonable doubt in the judge's mind as to the complainant's credibility.

(4) The argument that the judge had failed to take into cognizance the absence of a 'fresh complaint' of the complainant was dismissed, as the judge found that the complainant had complained 'as soon as she could'.

(5) The judge had also not ignored the fact that the complainant was slightly intoxicated.

(6) A plain reading of s 159 of the Evidence Act showed that the complainant's complaint to her sister over the phone and to her mother and sister were admissible as corroboration of the complainants own evidence. This evidence not only confirmed in material particulars that the complainant had been raped, but also that the appellant had raped her.

(7) There had to be a guarded approach to ex post facto crying or distress as evidence of corroboration because such might result from causes dissociated from the alleged offence, or the complainant might be putting on an act or simulating distress. That the judge warned himself of these dangers is clear. The appeal against conviction was accordingly dismissed.

(8) Although many of the aggravating features of rape were absent, rape involves an element of depravity, and the more so does a double rape. There was more than a hint of premeditation here.

(9) The judge had evidently looked at the two offences as one transaction and imposed sentences which cannot be described as manifestly excessive. The fact that the appellant is allergic to pain-killing drugs is not something the court could consider in deciding on the adequacy of sentence. The appeal against sentence was thus dismissed.

Cases referred to

1 *Haw Tua Tau* v *PP* [1981] 3 All ER 14; [1981] 2 MLJ 49 (folld)
2 *R* v *Beck* [1982] 1 All ER 807 (refd)
3 *R* v *Wilson* (1979) 58 Cr App R 304 (refd)
4 *R* v *Redpath* (1962) 46 Cr App R 319 (refd)

Legislation referred to

Criminal Procedure Code (Cap 68, 1985 Ed) s 121(6)
Evidence Act (Cap 97, 1985 Ed) s 159

Leo Fernando (*Peter Fernando* with him) for the appellant.
Michael Khoo for the respondent.

Cur Adv Vult

Grimberg JC (delivering the judgment of the court): The appellant was convicted of raping a young woman ('the complainant'), and of abetment of the rape of the complainant by another man, who was referred to in the course of the proceedings as Ah Huat. Ah Huat was separately charged with raping the complainant and with abetment of the rape of the complainant by the appellant.

The appellant was convicted on both charges, and sentenced to seven years' imprisonment and six strokes of the cane on the charge of rape, and seven years' imprisonment on the abetment charge; the sentences of imprisonment to run concurrently. Ah Huat absconded following his arrest and was never brought to trial. The accused appealed against his convictions and sentence. We dismissed the appeal, and these are our reasons for having done so.

On the evening of 9 June 1984, the complainant went out in a foursome with the appellant, Ah Huat and a second young lady called Jessica. The complainant and the appellant had known each other for about a year, and had been out on a number of occasions in the company of others. There had been, inter alia, an overnight excursion to Desaru, and the complainant had visited the appellant's home over the Lunar New Year in 1984. They each possessed the other's telephone number. Jessica was an acquaintance of the complainant's, and Ah Huat was also known to the complainant, although she did not know him anything like as well as she knew the appellant.

At about 9pm on 9 June the group had dinner at a coffee shop in Changi, and eventually proceeded to the Music Room, a discotheque at the Hilton Hotel. They arrived there at about midnight and left when the establishment closed at about 2.45am on the morning of 10 June. All four had drunk beer and danced. The complainant estimated that she drank 'about two glasses' of beer, which resulted in her feeling 'a little tipsy'. She had had to go to the toilet several times. After leaving the discotheque, Jessica was dropped off at her home. Her companions then drove towards the city, stopping at the Sea View Hotel on the way to make use of the toilets. They next stopped in a car park close to the Transit Food Centre near High Street.

The prosecution's case was that the offences with which the appellant and Ah Huat stood charged were committed by them at No 22, North Bridge Road ('No 22'), a shophouse situated close to the Transit Food Centre car park. The evidence of the complainant, in a nutshell, was that she was forced onto a bed, in a room on the second storey of No 22, and held down by Ah Huat while she was raped by the appellant; and that she was then raped by Ah Huat while the appellant held her down. It was common ground that the appellant drove the complainant home at about 5am, after the visit to No 22. She telephoned her sister at about 11am and complained that she had been raped by the appellant and another man, and at about noon she told her mother, sister and a friend, Angela, about it. She made a report at Toa Payoh police station at 3pm the same day, and at about 7.10pm she was seen by Dr Yeo Seow Heong. Dr Yeo found her to be non virgo intacta. His examination revealed a fresh tear of the hymenal ring. Swabs established the presence of seminal acid phosphates and spermatozoa. Dr Yeo concluded that his findings were consistent with the complainant having had recent sexual intercourse. However, apart from a few superficial scratch marks on both her shoulders, which may have been caused by finger nails, no injuries of any nature were found on, or in, any part of her person. The complainant's dress was found to be undamaged, as was her underwear, but the dress was found to be stained with semen of Ah Huat's group. The appellant's trousers were stained with semen, but its group was not established and in any event the appellant had declined to provide a specimen. The mattress on the bed at No 22 was found to be stained with semen of a group other than that to which Ah Huat's semen belonged.

The appellant was arrested at his home at about 12.30am on the morning of 12 June. He was told that he had been accused of rape by the complainant, who was present and identified him. At 2.25am on the same morning, he was charged with raping the complainant and a

statement ('the first statement') was recorded from the appellant pursuant to s 121(6) of the Criminal Procedure Code. Ah Huat was arrested at about 11.30am on 12 June. On 16 June it was decided to charge the appellant with having abetted the rape of the complainant by Ah Huat. At about 1.30pm that afternoon a statement ('the second statement') was recorded from the appellant under s 121(6) in relation to the abetment charge.

The admissibility of both the first and second statements was challenged at the trial. At the conclusion of the voire dire, and before the learned trial judge ruled on admissibility, counsel for the appellant conceded that the second statement was voluntary, and asked for it to go in. The learned judge held that the first statement was also voluntarily made, and therefore admissible. That determination was not challenged in the course of the appeal before us.

The first statement was in the following terms:

> On the said day and time, I was never at the said place. I was then at the Music Room, Hilton Hotel. I do not know where is 22, North Bridge Road. I did not use force to rape the said girl. It was at about 4am, that we were together alone in my car at the carpark of North Boat Quay. We were then kissing and hugging each other. She was a willing partner. I assisted to remove her panties. She also assisted me to pull my pants down. I then lie on top of her and used my penis to rub her vagina. The whole incident lasted only half an hour and she masturbated for me. My sperm ejaculated and spilled onto her abdomen. That is all I have to say at this stage except that we separated unhappily due to some quarrels.

In the second statement, the appellant said:

> I, Liew Kim Yong, deny that on 10 June 1984 at 3.05am, I ever instigated Pan Quing Fa ('Ah Huat'), my business associate, to rape (the complainant). As (the complainant) is my good friend, we are both willing (?) (not rape). I do not know whether Quing Fa had ever raped her. I was not at the abovementioned place at 3.05am. Please forgive me. As for the other charges, I was not told about them. Quing Fa and I are good business associates. I did not do such a thing. Thank you.

A statement recorded from the complainant's mother was read, and she was not cross-examined on it. The deponent stated that she had found the complainant on her bed, crying, at 8am on the morning of 10 June. The complainant declined to say what was upsetting her. The trial judge also heard evidence from an older married sister who said that she received a telephone call from a sobbing complainant at about 11am on the morning of 10 June, saying that she had been raped by the appellant and by another man. The sister went to the home of her parents, with whom the complainant stayed, and found the complainant in tears, with her mother and her best friend Angela by her side, trying to console her. The complainant led all three of them to a nearby playground where she told them about the incident.

At the conclusion of the prosecution's case, counsel for the appellant did not submit that no case against the accused had been made out which, if unrebutted, would warrant his conviction. The learned trial judge called upon the appellant to enter on his defence. The appellant gave evidence on his own behalf. He admitted that he went to No 22 with the complainant shortly after 3am on the morning of 10 June, and that they had had sexual intercourse there, the complainant having been wholly co-operative and willing. It followed that the appellant was disavowing the first statement as a total fabrication. The appellant went on to say in his evidence that after intercourse with the complainant, he walked out of the bedroom to go and wash in the bathroom, and was surprised to see Ah Huat on the landing. The arrangement had been that Ah Huat would wait in the office on the ground floor. In any event, the appellant proceeded to the bathroom, leaving Ah Huat on the landing. He returned to the bedroom four or five minutes later, and the burden of his evidence was that Ah Huat, taking advantage of his absence in the bathroom, had sneaked into the unlit bedroom, been mistaken by the complainant for the appellant, and had had intercourse with the complainant while she was under that misapprehension. Upon the complainant realizing that she had had intercourse with Ah Huat, and thinking that the appellant and Ah Huat had engineered the event, she had become very angry, and had been taken home, in a state of high dudgeon, by the appellant. It followed from the appellant's own evidence that the second statement was false in at least one important respect, namely, the appellant's claim that he was not at No 22 at the time when Ah Huat was alleged to have raped the complainant.

The appellant's essential complaint in the appeal was that the learned trial judge accepted the complainant's version of what took place without an adequate analysis of her evidence in what were said to be crucial areas. Both parties were well known to each other, and during the year or so that he had known her prior to 10 June 1984 the appellant had invariably behaved with propriety towards her. Was it credible, in the light of his earlier conduct, that he raped the complainant, a year into their friendship, and that he had had a hand in the raping of her by Ah Huat?

The complainant was not a habitual drinker, and would have been more susceptible to drink than most. Yet, it was argued, the learned trial judge had failed to consider the effect on the complainant of the beer she had drunk. He was obliged to do so, even though he had received no guidance in this respect from counsel for the appellant at the trial. The complainant had been vague as to what had been done to her; in telling her mother, sister and Angela about the incident, the complainant, who was not naive, had said that she did not know whether the appellant's penis had entered her vagina until it was explained to her by them that, by reason of the pain she had

experienced, this must have occurred. If she did not know what was happening to her as a result of drink, that, said counsel, went to consent, and the probability of rape began to recede. It is also well known, counsel went on, that alcohol impairs memory for recent events. Come the dawn, after uncharacteristic sexual conduct - the complainant having been a virgin - remorse, post-coital regret and anger sets in. In those circumstances, how much reliance could be placed on the complainant's evidence?

Counsel referred to a number of weaknesses and inconsistencies in the complainant's evidence. We will refer only to those which counsel considered to be the most significant. Firstly, the complainant had said in her police report that the complainant and Ah Huat had carried her up the stairs of No 22. Yet in her evidence she had stated that the appellant went upstairs first, followed by the complainant, with Ah Huat bringing up the rear. This was a grave discrepancy, which not only went to the complainant's reliability, but also to consent. Secondly, the complainant had given evidence of a struggle. She had said that there had been pushing, pulling and pinning down in the commission of a double rape. But, apart from scratches on both shoulders (to which the complainant had not alluded when she was medically examined, and which the doctor had clearly regarded as insignificant), there were no injuries whatsoever; no bruising or reddening of the skin; no tenderness around the vulva or in the vagina; no damage to the complainant's dress or underwear. Nothing. Was that, counsel asked, consistent with a struggle having taken place?

Thirdly, the complainant had said that she was menstruating at the time of the alleged offence. Yet no blood had been found on the bed, the pillows or the bedclothes. It was therefore right for the judge to have been sceptical of the complainant's assertion that she would not (apart from any other reason) have consented to intercourse during a menstruation. Fourthly, there had been no 'fresh complaint'. The complainant's mother, who was not strict and with whom the complainant had a good relationship, had entered the complainant's bedroom at about 8am, and had found the complainant in tears. Yet the complainant had told her mother nothing. This, it was said, went to the heart of the complainant's reliability. Lastly, there had been no allegation on the complainant's part, of a threat; there had been no weapon; she had not screamed; in short, there was a total absence of the stock characteristics of a rape, let alone a double rape, and where independent evidence existed, it tended to undermine rather than support the complainant.

Counsel for the appellant conceded that corroboration is not essential in law. However, corroboration is a matter of prudence and practice, and the learned trial judge had been wrong to conclude that the complainant had complained as soon as she could, and that by her complaint she had corroborated herself. She had arrived home at about 5.50am; she had said nothing to her mother at 8 am; she had failed to telephone her sister until hours later, and the complaint was eventually cross-examined out of her by her mother, sister and Angela. Although s 159 of the Evidence Act seems to suggest that a witness may corroborate himself, that cannot have been what the legislature intended. The fact that the complainant was seen to be crying on the morning of 10 June was, at most, evidence of consistency and was not corroboration. In the result, the learned trial judge, as the finder of fact, had failed to direct himself to the necessity for, and the absence of, corroboration, and the conviction was accordingly unsafe.

It could be said, argued counsel, that at the end of the prosecution's case the appellant ought not to have been called upon to enter upon his defence, since the essential ingredients of the offences had not been proved. Even if that were wrong, and the appellant was correctly called upon to make his defence, there were so many inconsistencies in the case against the appellant, it was so flawed for absence of corroboration and otherwise, that a reasonable doubt had arisen and the appellant should have been acquitted at the end of the day.

We deal first with the submission that the defence ought not to have been called, a point not taken in the petition of appeal. In our judgment, it is plain on the face of the record, and it was not submitted otherwise by counsel for the appellant at the trial, that when the prosecution concluded, a case had been made out which if unrebutted would have warranted his conviction. The test in *Haw Tua Tau*,[1] (which counsel for the appellant submitted, in passing, was wrongly decided by the Privy Council but by which, he was obliged to concede, we are bound), was demonstrably passed. Once that hurdle had been got over by the prosecution, the learned judge was entitled to set the appellant's version of events against that of the complainant's. It is evident that he did so with considerable care, and that his conclusion was that the complainant was a truthful witness, and that the appellant had lied.

We leave the subject of drink with the observation that the appellant had also been drinking (16 beers had been ordered during the course of the outing). To turn an argument advanced on behalf of the appellant against him, it is perfectly possible that it was drink that led the appellant to behave in a manner which was wholly uncharacteristic of his conduct towards the complainant earlier in their friendship. As to the principal inconsistencies in the complainant's evidence, it is clear that the learned trial judge was alive to them. He said:

> Jackie had in all honesty admitted that there were varia-tions between her account of the incident in the bedroom at No 22 North Bridge Road both at the preliminary inquiry and

whilst under cross-examination on the one hand, and whilst testifying in-chief on the other. Now what were these variations about? Not about when or where she had been raped. And most certainly not about who had raped her. The differences were merely about the sequence of events just before and during the time she was being ravished by the two men in the dark. Merely about details of who did what in the dark.

and again:

Much was also made by the defence of the first information report exh p 23 made by (the complainant) where it was stated that 'they carried me upstairs' and (the complainant) had not named the second person who had raped her. Jackie was quite adamant during her testimony that she was not carried up the stairs by the two men to the top landing of No 22 North Bridge Road. She said she did not use the word 'carried' when making the report, though the recording officer, ex-Sgt Peter Giang (PW5) stated that she did. However, Sgt Giang confirmed that Jackie spoke in 'simple English'. Jackie was educated in the Chinese stream until secondary three. Her main dialect of communication was Teochew and she had to make the report in English, a language she was not fluent in. In fact she had to be assisted in making the report by her friend Angela Tay. There was a probability that there was a miscommunication between Jackie and the recording officer.

Jackie did not know the actual name of Ah Huat. She had known him as 'Ah Huat' and 'Char-less'. She had met him only once previously. She had told the Sgt that she did not know the name of the Indonesian man. That was not a lie. There was no reason why she should have lied. She knew the accused's name and so named him in the report as 'Bernard Liew'.

It is a fact that no injuries were found upon the complainant other than the scratches on her shoulders. That is perhaps unusual, but the absence of other injuries clearly did not raise a reasonable doubt in the learned judge's mind as to the complainant's credibility. Although she was forced onto the bed, this was not a case involving the degree of violence that is often visited upon victims of rape. The learned judge found that the scratches on the shoulders were consistent with the complainant having been held down. It was not suggested to the doctor who examined the complainant that it was surprising for a rape victim who was previously virgo intacta not to have suffered bruising in the region of the vulva and in the vaginal passage. Had that been put, he might well have pointed out that menstrual blood in a victim who was having a period could have acted as a lubricant, and have prevented the bruising which would otherwise have occurred. That the complainant was menstruating is beyond doubt - the appellant said that he wiped her blood off the bed sheet and disposed of her sanitary pad.

We dismissed the criticism that the learned trial judge failed to take cognizance of the absence of a 'fresh complaint'. He found that the complainant complained 'as soon as she could'. It was understandable that she did not tell her mother about the incident when she was found, distressed, on her bed at 8am on the morning of the offence. The complainant said:

I was afraid to tell my mother. I was afraid she might scold me and blame me. I was also afraid she might not be able to stand the shock.

She telephoned her sister later in the morning

I requested her to come over immediately. She asked me what the matter was. I told her I had something important to tell her. She kept pestering me and I then told her briefly that I was raped. She asked me 'who'. I said one person was called Bernard, (the appellant).

As to the effect on her of the beer that she had drunk, the complainant volunteered that she was 'a bit tipsy'. Nowhere in his evidence did the appellant even hint that the complainant was visibly affected by drink, nor was it suggested by him, or on his behalf, that drink may have led to actual consent, or to the failure by the complainant to communicate absence of consent.

The criticism that the learned judge had not taken into account the effect of drink was not justified. He did not ignore the fact that the complainant was slightly intoxicated. He said:

How could any girl, who was being raped by two men, be expected to remember in detail and in the exact sequence the course of events? Even a girl who had had sexual intercourse willingly with a partner could not be expected to recall and narrate in detail every step in their love- making. In this case Jackie was frightened, confused and upset at what they were doing to her and was also a bit tipsy. How could she be expected to narrate accurately and in sequence the acts of rape? Where her hands and legs were at various stages of the rape, where the accused and Ah Huat were exactly supposed to have held her. I find that Jackie's evidence was credible and capable of belief.

When the complainant telephoned her sister on the morning of 10 June, she stated unequivocally that she had been raped, that is to say that there had been penetration. It is true that later in the day, when recounting the incident to her mother, her sister and Angela, the complainant had said that there had been pain but that she did not know if there had been penetration. That apparently surprising statement is explained by the complainant's evident reluctance to speak to her mother about the episode, illustrated by her refusal to communicate when she was seen crying by her mother at 8am.

It is clear from a plain reading of s 159 of the Evidence Act that evidence of the complaint to the sister on the telephone, and then the complaint to the mother, sister and Angela was admissible as corroboration of the complainant's own evidence as to the offence. It is clear that the learned trial judge looked for corroboration and properly regarded that evidence as corroborative, that is to say as evidence which confirmed in material particulars, not only that the complainant had been raped, but also that the appellant had raped her - see *R* v *Beck*.[2]

The learned trial judge found that the complainant's 'distressed condition' when she was seen by her mother at 8am on 10 June, 'lent support to her story of being raped'.

It is well-established that there must be a guarded approach to ex post facto crying or distress as evidence of corroboration - see, for example, *R* v *Wilson*[3] - because distress might result from other causes dissociated from the alleged offence; or the complainant 'might be putting on an act or simulating distress' - the words of Lord Parker CJ in *R* v *Redpath*.[4] That the learned trial judge warned himself of the danger is manifest. In doing so, he adopted Lord Parker's phraseology:

> Jackie's mother had found her in a distressed state barely a few hours after the rape. The circumstances under which the mother found her did not suggest that Jackie was putting on an act and was simulating distress. Her mother had found her crying in the bedroom and, when questioned, had refused to tell the mother what had happened because she was too ashamed to do so. Jackie's distressed condition lent support to her story of being raped.

It is right to observe, in any event, that the trial judge seems to have concluded, by the use of the words lent support to the story that the evidence of distress fell somewhat short of corroboration, in the accepted sense of confirmation, and amounted to little more than evidence of consistency.

Counsel for the appellant conceded at the outset of his argument that he had a considerable task ahead of him in the appeal against conviction, for the reason that the learned judge found the complainant to be a witness of truth and the appellant to be a liar. We were obliged to agree, and determined at the conclusion of argument that the task was one which counsel had been unable to accomplish. The appeal against conviction was accordingly dismissed.

We gave anxious consideration to what was said on the appellant's behalf in the appeal against sentence. There had been no violent assault, no weapon, no threats; the complainant was a worldly young woman, the relationship between her and the appellant prior to the offence had been pleasant and easy-going; they had been drinking; and the appellant had driven her home after the offence and telephoned her the next day. Thus it is true to say that many of the aggravating features of a rape were absent. It was also urged upon us that the appellant is allergic to pain-killing drugs, and that the sentence of caning ought to be set aside on this ground as well, since the consequences would be very painful if that part of the sentence were carried out.

In the event, we dismissed the appeal against sentence as well. Rape involves an element of depravity, and the more so does a double rape. There was more than a hint of premeditation - a game of forfeits with which the complainant was unfamiliar, resulting in her, a non-drinker, consuming two glasses of beer; dropping Jessica first when the complainant had expressly asked to be taken home; going to the High Street car park close to No 22, to which the appellant had access. It is clear, too, that the complainant was severely shocked, distressed and humiliated. The learned trial judge evidently looked at the two offences, in effect, as one transaction, and imposed sentences which cannot under any circumstances be described as manifestly excessive. We were not disposed to interfere with the sentence of caning on the grounds of the appellant's allergy to analgesics. That was not a matter which we were disposed to take into account, although it will no doubt have been borne in mind by those concerned with the execution of that part of the sentence, if drawn to their attention.

Appeal dismissed.

Solicitors: *Leo Fernando.*

Reported by *Terence Tan Bian Chye*

A-B Chew Investments Pte Ltd v Lim Tjoen Kong

HIGH COURT (SINGAPORE) - SUIT NO 10980 OF 1985
COOMARASWAMY J
31 JULY 1989

Civil Procedure - Summary judgment - Striking out of affidavits on ground that they referred to 'without prejudice' negotiations - Evidence Act (Cap 97, 1985 Ed), ss 17 & 23

Evidence - 'Without prejudice' privilege - Whether privilege waived - Reference to 'without prejudice' negotiations filed by party claiming privilege - Evidence Act (Cap 97, 1985 Ed), s 23

The plaintiffs claimed that they had made a contract with the defendant under which the latter agreed to purchase shares in SPP Ltd. The plaintiffs claimed that the defendant had breached the contract. Certain negotiations occurred between the plaintiffs' representatives and a broker, Khoo, (through whom the whole contract was allegedly arranged) and another person ('the negotiations'), the exact happenings and effect of which was in dispute between the parties. The plaintiffs applied for summary judgment against the defendant while the defendant applied to strike out the plaintiffs' statement of claim on the ground that he was not a party to any contract with the plaintiffs. An affidavit filed by the defendant referred to the negotiations. The plaintiffs filed an affidavit disputing the version of the negotiations in the affidavit filed by the defendant. The defendant then filed two affidavits which countered the plaintiffs' affidavit.

The assistant registrar heard both applications and struck out several paragraphs of the affidavits filed by the plaintiffs for the proceedings on the grounds that the contents referred to negotiations which had been conducted 'without prejudice'.

The plaintiffs appealed to the High Court. The defendant contended that although affidavits tendered by him referred to 'without prejudice' negotiations, the privilege is not waived simply by filing an affidavit which makes reference to privileged matters.

Held, allowing the plaintiffs' appeal:

(1) The issue before the court was whether the privilege